Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, ET AL.,
DONALD MATTHEWS, ET AL.
Plaintiffs
Petitioners

v.

FREDERICK BITZER, CHAIRMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions below are as set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Whether in a suit under Title VII of the Civil Rights Act of 1964 by private individuals, who are retired state employees, against state officials, in their official capacity,

the Eleventh Amendment bars an award by a federal court of back retirement pay covering periods prior to the date of judgment, which must be paid with state funds.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions should be considered, in addition to those listed in the petition:

Conn. Gen. Stat., § 5-156:

> Retirement fund. All member contributions and state appropriations shall be held in a separate retirement fund by the treasurer, who may invest and reinvest as much of the fund as is not required for current disbursements in accordance with the law governing the investment of trust funds as defined in section 45-88.

Constitution of Connecticut, Article Eleventh, Section 4:

> Claims against the state shall be resolved in such manner as may be provided by law.

STATEMENT OF THE CASE

The statement set forth in the petition is adequate.

ARGUMENT

1. The Decision Below is Clearly Correct.

The petitioners had contended that the recalculated benefits sought by them would not be paid out of the public funds in the state treasury nor by the defendants out of their personal funds, but would be paid out of the retirement fund. The petitioners later amended their complaint to seek

an award from "the retirement fund and/or state moneys." The United States Court of Appeals for the Second Circuit found that the State Employees' Retirement Fund in Connecticut is composed of contributions by both the employees and the state. The court found that the state is required to appropriate funds on an actuarial basis and to pay at least 75% of the total retirement income payments for each year. Conn. Gen. Stat., § 5-156a. Thus, while the fund is referred to in Conn. Gen. Stat., § 5-156 as "a separate retirement fund" the court correctly concluded that the State Employees' Retirement Fund was an "alter ego" of the state and shares the state's Eleventh Amendment immunity. In determining whether an entity or agency is a state entity or agency for purposes of the Eleventh Amendment, a court must consider many factors, such as: If the plaintiff prevails, will judgment have to be paid out of the state treasury. *Whitten* v. *State University Const. Fund*, 493 F.2d 177, 180 (1st Cir. 1974). Further factors to be considered in determining whether or not Eleventh Amendment immunity is present are:

a. has the entity been separately incorporated;

b. is it performing governmental or proprietary functions;

c. does it have the power to sue and be sued and to enter into contracts;

d. has the state immunized itself from responsibility for the agency operations; and

e. the degree of autonomy over its own operations exercised by the entity.

See *Whitten* v. *State University Const. Fund*, 493 F.2d at 179-80; *Gordenstein* v. *University of Delaware*, 381 F. Supp. 718; *Krisel* v. *Duran*, 258 F. Supp. 845 (S.D.N.Y. 1966), aff'd.

per curiam 386 F.2d 179 (2d Cir. 1967), cert. denied 390 U.S. 1042 (1968). From the foregoing it is evident that the court correctly concluded that the State Employees' Retirement Fund shares the Eleventh Amendment shield.

2. There is No Important Question of Federal Law.

The petitioner alleges that the question of whether the Eleventh Amendment has been limited by enactment of the Fourteenth Amendment has been left unanswered. The court below relying upon *Edelman* v. *Jordan*, 415 U.S. 651 (1974) disposed of the petitioners' contention *Edelman* did not answer the question, by opining:

> "Thus there is no reason in this case to depart from the balance between the Eleventh Amendment and other constitutional interests which was most recently reaffirmed in *Edelman*. In any event it may not still be open to this court to accept plaintiffs' invitation to disregard the Eleventh Amendment in Fourteenth Amendment cases. While Justice Marshall's dissent in *Edelman* suggested that the Supreme Court had not decided whether the Eleventh Amendment is limited by the later enactment of the Fourteenth, 415 U.S. at 694 n. 2, the majority in that case expressly overruled *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *State Department of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972) (per curiam), and *Wyman* v. *Bowens*, 397 U.S. 49 (1970) (per curiam), all cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state. 415 U.S. at 670-71. See also *Wilkerson* v. *Meskill*, 501 F.2d 297 (2d Cir. 1974), in which this court affirmed *per curiam* on the basis of *Edelman* a dismissal of plaintiff's claims to back wages from the state based on equal protection and due process, although without considering the arguments presented here. Further see *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 n. 7 (3d Cir. 1974); *Burton* v. *Waller*, 502 F.2d 1261, 1273 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (U.S. No. 74-875 Mar. 4, 1975)."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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